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No. 97-378

In the Supreme Court of the United States

OCTOBER TERM, 1997

PETER MAIER, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency acted in an arbitrary and capricious manner by refusing to amend its secondary treatment regulations for publicly owned treatment works under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, to include technology-based limitations on nitrogenous biochemical oxygen demand.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A52) is reported at 114 F.3d 1032.

JURISDICTION

The court of appeals entered its decision on May 28, 1997. The petition for a writ of certiorari was filed on August 26, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Peter Maier, *et al.*, petitioned the Environmental Protection Agency (EPA) to initiate a new rulemaking to amend regulations that the agency had issued under the Clean Water Act (CWA), 33 U.S.C.

1251 *et seq.*, governing secondary treatment for publicly owned treatment works (40 C.F.R. Pt. 130). See Pet. App. B1-B21. The EPA denied petitioners' request. *Id.* at C1-C30. Petitioners sought review of that decision in the United States Court of Appeals for the Tenth Circuit, which upheld the agency's decision. *Id.* at A1-A52.

1. Congress enacted the Clean Water Act (CWA) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. 1251(a). To achieve that goal, the CWA makes the discharge of pollutants by any person unlawful unless the discharge is in compliance with the CWA and regulatory requirements. CWA § 301, 33 U.S.C. 1311. Those requirements include effluent limitations, which are restrictions "on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources." CWA § 502(11), 33 U.S.C. 1362(11). The CWA imposes permitting requirements under a program known as the National Pollutant Discharge Elimination System (NPDES). See CWA § 402, 33 U.S.C. 1342. NPDES permits "transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations * * * of the individual discharger." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). See Pet. App. A2-A3.

NPDES permits typically include technology-based limitations, which represent the degree of control that can be achieved by point sources using various levels of pollution control technology. See CWA §§ 301, 304, 33 U.S.C. 1311, 1314; *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-136 (1977).

For publicly owned treatment works (POTWs), Section 301(b)(1)(B) specifies the applicable technology-based control standard as effluent limitations based upon "secondary treatment." 33 U.S.C. 1311(b)(1)(B). The CWA does not define the term "secondary treatment" and, instead, delegates that task to the EPA. See CWA § 304(d)(1), 33 U.S.C. 1314(d)(1). The EPA has published regulations to define "the degree of effluent reduction attainable through the application of secondary treatment." *Ibid.*; see generally 40 C.F.R. Pt. 133. In addition to technology-based limitations, NPDES permits, including those for POTWs, typically require dischargers to comply with any more stringent limitations, including those necessary to meet water quality standards established by state law. See CWA § 301(b)(1)(C), 33 U.S.C. 1311(b)(1)(C); see also *Arkansas* v. *Oklahoma*, 503 U.S. 91, 100 (1992). See generally Pet. App. A3-A4.

The EPA promulgated secondary treatment regulations in 1973, and it revised those regulations in 1976, 1977, 1984, and 1985.* The EPA's regulations describe sewage treatment processes as "primary" or "secondary" based on the pollutant and the associated removal technology. 40 Fed. Reg. 34,522 (1975). As a general matter, primary treatment removes pollutants through liquid-solid separation techniques,

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* See 38 Fed. Reg. 22,298 (1973) (initial regulations); 41 Fed. Reg. 30,786 (1976) (deleting limitation on fecal coliform and limiting applicability of pH limitation); 42 Fed. Reg. 54,664 (1977) (allowing upward adjustment of suspended solids limitation for certain POTWs); 49 Fed. Reg. 36,986 (1984) (allowing substitution of five-day carbonaceous biochemical oxygen demand ($CBOD_5$) test for five-day biochemical oxygen demand (BOD_5) test); 50 Fed. Reg. 23,382 (1985) (modifying percent removal requirement).

while secondary treatment eliminates remaining pollutants (particularly degradable organic materials) through biological treatment systems. *Ibid.* The EPA imposes specific effluent parameters under the POTW secondary treatment regulations. For example, the current regulations limit total suspended solids (TSS) on both a monthly and weekly basis, they specify a pH range (which indicates the acidity or alkalinity of the wastewater), and they impose limitations on biochemical oxygen demand (BOD). See 40 C.F.R. 133.102. See generally Pet. App. A4-A5.

The BOD parameter measures "the amount of oxygen used by microorganisms in metabolizing (consuming) wastewater constituents during a specified time period." 48 Fed. Reg. 52,258, 52,274 (1983). It provides an indication of the effluent's effect on the receiving water's dissolved oxygen content, which must be sustained to support fish and other oxygen-consuming aquatic organisms. BOD in wastewater has two distinct components: carbonaceous biological oxygen demand (CBOD) and nitrogenous oxygen demand (NOD). CBOD is "the amount of oxygen consumed by various microorganisms in metabolizing organic (carbon) matter in the wastewater." *Ibid.* NOD is "the oxygen consumed by other types of bacteria * * * in converting ammonia to nitrite and then to nitrate, a process known as nitrification." *Ibid.* The EPA has historically focused on the CBOD component of BOD in formulating secondary treatment regulations because CBOD normally poses the more serious water quality threat and because POTWs have encountered greater difficulties in developing and implementing effective NOD control technology. *Id.* at 52,275. See Pet. App. A5-A6.

The EPA initially adopted a specific BOD parameter as the appropriate standard for BOD in its secondary treatment regulations, and it rejected other parameters, including a specific NOD parameter, that it concluded were not useful measures of effective secondary treatment because, due to the nature of the parameter, NOD would not be removed at consistent levels. 48 Fed. Reg. 52,273 (1983). In the course of the EPA's 1984 rulemaking, which revised the BOD parameter in certain respects, one of the petitioners in this case commented that the secondary treatment standards should include direct limitations on NOD. 49 Fed. Reg. 36,999 (1984). The EPA concluded that NOD was an inappropriate parameter for a generally applicable technology-based standard. It reasoned that the variation in local conditions, particularly the characteristics of the receiving waters, prevented the NOD parameter from providing, as a general matter, an effective measure of the effluent's impact on water quality. *Ibid.* Accordingly, the EPA decided that requirements for NOD control should be determined on a case-by-case basis for each receiving water segment under Section 301(b)(1)(C) and should not be applied across-the-board through secondary treatment standards. *Ibid.* See Pet. App. A6-A8.

2. In 1993, petitioners filed the petition for rulemaking that is the subject of this case. Petitioners renewed the past request that the EPA amend its secondary treatment regulations to include standards for NOD. See Pet. App. B1-B21. EPA denied the petition. *Id.* at C1-C30. It noted, among other things, that the usefulness of the NOD parameter depended on local water quality characteristics and that the federal and state governments were successfully regulating NOD through water-quality based effluent

limitations in individual NPDES permits. *Id.* at C19-C25. See *id.* at A8-A9,

3. Petitioners filed a petition for review in the court of appeals challenging the EPA's denial of its petition for a rulemaking. The court of appeals denied petitioners' request for relief. The court first ascertained its jurisdiction over the subject matter. Pet. App. A9-A17. It then turned to the merits and reviewed the agency's denial of the rulemaking petition under the Administrative Procedure Act's "arbitrary and capricious" standard of review. *Id.* at A18-A21.

Applying the analytical framework set out in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court of appeals determined that Congress had not precisely addressed the question whether the EPA must regulate NOD in its secondary treatment regulations. Pet. App. A22-A30. It concluded that the agency's decision to regulate NOD on a case-by-case basis through the NPDES permitting process rested on a reasonable construction of the statute and was entitled to deference. *Id.* at A30-A37. The court noted that the EPA's decision was appropriate in light of the agency's uncontroverted determinations that the effects of NOD are highly variable and site-specific and that NOD can be effectively controlled on a case-by-case basis through the permitting process. *Id.* at A32-A33. Judge Lucero dissented in part. *Id.* at A38-A52.

ARGUMENT

The decision of the court of appeals is correct, it does not conflict with any decision of this Court or another court of appeals, and it presents no recurring legal issue of general importance warranting review

by this Court. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioners assert that the court of appeals' decision is in conflict with this Court's decision in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). That contention is incorrect. *Chevron* directs that when a court reviews an agency's interpretation of a statute, it must first examine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The court of appeals correctly applied those principles in upholding the EPA's action in this case.

Applying the first step of the *Chevron* framework, the court correctly determined that Congress had not directly addressed the precise question at issue here. Pet. App. A23-A30. The court specifically examined the relevant CWA provisions, Sections 301(b)(1)(B) and 304(d)(1), and correctly determined that they do not resolve the question whether EPA is required to impose a generally applicable parameter for NOD in its secondary treatment regulations. *Ibid.* Section 301(b)(1)(B) provides that POTWs must achieve effluent limitations "based upon secondary treatment as defined by [EPA] pursuant to [Section 304(d)(1)]." 33 U.S.C. 1311(b)(1)(B). Section 304(d)(1) requires EPA to publish "information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment." 33 U.S.C. 1314(d)(1). Those provisions do not resolve whether EPA must regulate NOD under its secondary treatment regulations.

Under the second step of the *Chevron* framework, the courts must defer to the agency's reasonable construction of a statute that it is charged with administering. 467 U.S. at 843. The court found that the EPA had properly exercised its discretion in concluding that a generally applicable standard for NOD is inappropriate. As the agency explained in rejecting petitioners' request for a rulemaking, the effects of NOD are site-specific and variable, and NOD should therefore be regulated on a case-by-case basis through water-quality-based effluent limitations. See Pet. App. C1-C30. The court of appeals specifically considered and rejected petitioners' various challenges to the agency's exercise of its discretion. *Id.* at A30-A37.

Petitioners mistakenly assert that the court of appeals erred in the second step of the *Chevron* analysis. See Pet. 7-10. According to petitioners, the court of appeals set forth an interpretation of Section 301(b)(1)(B) of the CWA that was not offered by EPA and that (according to petitioners) is inconsistent with the EPA's view of the statute. Pet. 8 n.3. Petitioners specifically point to the court's reliance on the term "based upon" in Section 301(b)(1)(B) for its conclusion that the CWA does not require EPA to develop generally applicable effluent limitations for all pollutants that could be addressed by secondary treatment. See *Ibid.*

Petitioners fail to recognize that the court interpreted Section 301(b)(1)(B) in the course of determining, under the first step of the *Chevron* analysis, that the CWA does not address the precise question at issue. The court concluded that the CWA does not

require that the EPA regulate all pollutants potentially subject to secondary treatment, stating:

> The statute requires that generally-applicable effluent limitations for POTWs be "*based upon* secondary treatment." 33 U.S.C. § 1311(b)(1)(B) (emphasis added). Contrary to [petitioners'] assertion, the statute does not on its face require that the generally-applicable effluent limitations address all pollutants that might be reduced by secondary treatment.

Pet. App. A29. As that passage indicates, the court construed Section 301(b)(1)(B) in response to the contrary analysis offered by petitioners under the first step of the *Chevron* analysis.

The court also made that point explicitly in response to the dissent's claim that the court was substituting its interpretation for that of EPA under the second step of the *Chevron* analysis:

> The dissent suggests that our analysis of section [301] substitutes our own construction of the statute for that advanced by the agency. In so doing, the dissent fails to distinguish between the source of agency discretion, which we must determine in the first instance under *Chevron*, and the basis for the agency's exercise of its discretion, for which the dissent correctly observes we may not supply our own rationale.

Pet. App. A30 n.17. As that passage indicates, the court performed its judicial function under the *Chevron* framework of determining whether the statute confers discretion. Even if the EPA disagreed with the court's interpretation of the phrase "based upon" in Section 301(b)(1)(B), the court was entitled under

Chevron to rely on its own judgment in determining whether that provision addresses the precise issue here. Having found that the provision does not address the issue, the court properly deferred to the agency's reasonable interpretation of its statutory obligations under the CWA.

In any event, petitioners' assertion that the EPA disagrees with the court of appeals' construction of Section 301(b)(1)(B) is incorrect. Petitioners rely on the dissent's representation of the EPA's views. See Pet. 9. The dissent, in turn, states that "the relevant regulatory history strongly suggests" that the EPA would take the position that secondary treatment standards must be promulgated for any pollutant that could be reduced through secondary treatment. Pet. App. A41-A42. The dissent, however, is in error in its assessment of the agency's views.

The EPA specifically concluded that a generally-applicable secondary treatment standard for NOD is not appropriate—despite the fact that technologies exist to reduce NOD—because the effects of NOD are extremely variable and subject to local water conditions. Pet. App. A32-A33, C16-C22. If the EPA held the view suggested by the dissent, then the agency would have to require *all* municipalities with POTWs to expend resources on technologies that may not be necessary to control pollution. The EPA has indicated instead that water-quality-based effluent limitations should be developed for POTWs on a case-by-case basis where NOD actually leads to an impairment of water quality. That point was not lost on the majority:

> The fact that Congress has * * * provided for [water] quality-based permitting as a gap-filling

> measure gives strong support to the EPA's exercise of delegated authority to fill the gap where it has concluded that NOD should not be part of standard secondary treatment. The fact that secondary treatment controls are technology-based does not preclude the EPA from deciding that certain technologically-attainable standards are necessary and appropriate only for some POTWs. We should not order the agency to develop generally-applicable parameters based on the use of new technology, even if cost-effective, in the face of the agency's reasoned judgment that the use of such technology is irrelevant to the attainment of water quality standards in many circumstances.

Id. at A34. In short, the court of appeals' construction of the relevant provisions of the CWA is consistent with that of the EPA.

2. Petitioners also argue that the court of appeals' decision conflicts with this Court's decision in *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976), which held that the provisions of the CWA then in force did not subject federal facilities to state permitting requirements. 426 U.S. at 227-228. The Court's decision in that case did not address POTW secondary treatment requirements. Petitioners nevertheless assert a "direct conflict" based on a passage of the Court's opinion that describes the CWA's regulatory scheme. Pet. 10.

As petitioners note, this Court observed that the CWA differs from previous water pollution control programs because it subjects point sources to technology-based effluent limitations as well as to limitations derived from water-quality standards.

Pet. 10 (citing *EPA* v. *California*, 426 U.S. at 204-205). See 426 U.S. at 205 n.12. The Court did not suggest, however, that the CWA requires the EPA to impose technology-based effluent limitations on POTWs in every instance in which they might conceivably be applied. As the court of appeals correctly stated, the specific provisions of the CWA that are applicable to POTWs provide that "effluent limitations for POTWs must be 'based upon' secondary treatment technology, not co-extensive with it." Pet. App. A33. There is nothing in the CWA, or in this Court's decisions interpreting that statute, that would require the EPA to impose generally applicable technology-based effluent limitations on POTWs without examining whether circumstances warrant applying those limitations to all POTWs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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